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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Robert L. Berry	)	
	)	
Plaintiff,	)	No. CIV 04-2922 PHX RCB
	)	
vs.	)	O R D E R
	)	
John E. Potter, Postmaster	)	
General, U.S. Postal Service	)	
	)	
Defendant.	)	

On December 17, 2004, Plaintiff filed suit against the United States Postal Service (the "Postal Service"), alleging that he was improperly denied a promotion either on the basis of his age or in retaliation for previous complaints filed with the Equal Employment Opportunity Commission ("EEOC") in violation of the Age Discrimination in Employment Act ("ADEA") and Title VII. Compl. (doc. # 1). On July 15, 2005, the United States filed a Motion to Dismiss for Improper Venue, or in the Alternative to Transfer Case (doc. # 9), arguing that the proper forum for Plaintiff's Title VII claim is the Northern District of Ohio, not the District of Arizona. Plaintiff opposes transfer. Resp. (doc. # 10). Having

1 carefully considered the arguments raised, the Court now rules.

2 **I. BACKGROUND**

3 Plaintiff, born 1952, Compl. (doc. #1) at 2, has apparently  
4 been in the employ of the Postal Service for the past thirty years,  
5 and becomes eligible for retirement in October 2007, Resp. (doc. #  
6 10) at 3. He currently serves at a duty post in Glendale, Arizona  
7 as the Manager of Remote Encoding Operations, a position he has  
8 held since 1995. See id. at 2-3.

9 During his employment with the Postal Service over the years,  
10 Plaintiff filed complaints with the EEOC. The most recent of these  
11 complaints concerns his non-selection for a Plant Manager position  
12 in Akron, Ohio, which is at the center of the present controversy.  
13 Compl. (doc. # 1) at 2; Resp. (doc. # 10) at 1-2. Following two  
14 and a half years of additional training and work assignments,  
15 Plaintiff was listed as "ready" to assume the responsibilities of  
16 the position, but was ultimately passed over for the promotion in  
17 favor of a thirty-five-year-old candidate who was listed as "not  
18 ready." Compl. (doc. # 1) at 2. After exhausting administrative  
19 remedies, Plaintiff filed the present action alleging that the  
20 Postal Service improperly discriminated against him either on the  
21 basis of his age or in retaliation for his previous EEOC complaints  
22 in violation of the ADEA and Title VII.

23 **II. DISCUSSION**

24 The United States contends that Plaintiff's Complaint should  
25 be dismissed for improper venue pursuant to Federal Rule of Civil  
26 Procedure 12(b)(3) because the District of Arizona is not a proper  
27 forum for Plaintiff's Title VII claim. Mot. (doc. # 9) at 2-3.  
28 Alternatively, the United States petitions the Court to transfer

1 this case to the Northern District of Ohio pursuant to either 28  
2 U.S.C. § 1406(a) or 1404(a).<sup>1</sup> Id. at 3-5.

3 **A. Motion to Transfer Venue**

4 A transfer request pursuant to section 1406(a) necessarily  
5 turns upon the same underlying issue as a motion to dismiss  
6 pursuant to Rule 12(b)(3)-- whether the action lays venue in the  
7 wrong judicial district. The Court will therefore begin its  
8 discussion by turning to the United States' request to transfer  
9 venue pursuant to section 1406(a).

10 **1. Transfer Pursuant to 28 U.S.C. § 1406(a)**

11 Under section 1406(a), "a case laying venue in the wrong  
12 division or district" must either be dismissed, "or if it be in the  
13 interest of justice," transferred "to any division or district in  
14 which it could have been brought." 28 U.S.C. § 1406(a). Before  
15 examining the propriety of venue in this District, however, the  
16 Court will address the United States' pending request for leave to  
17 file a sur-reply (doc. # 13) directed to that issue.

18 **a. The United States' Request for Leave to File a Sur-Reply**

19 Plaintiff has filed an unauthorized second response (doc. #  
20 12) in which he argues that venue is appropriate in this District  
21 under the general venue statute, 28 U.S.C. § 1391(e). The United  
22 States is correct in noting that a party is generally entitled to  
23 only one responsive memorandum, and that Plaintiff should therefore  
24 be barred from raising new arguments in his unauthorized second  
25 response. See Mot. to Disregard Pl.'s Additional Resp. (doc. #

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26  
27 <sup>1</sup> The Title VII venue statute explicitly recognizes the  
28 possibility of venue transfers pursuant to sections 1404 and 1406.  
See 42 U.S.C. § 2000e-5(f)(3).

1 13). Alternatively, the United States petitions the Court for  
2 leave to file a sur-reply. Id.

3 For present purposes, the Court can conclude that Plaintiff's  
4 argument under section 1391(e) would fail without inviting any  
5 further response from the United States. The appropriate venue for  
6 Plaintiff's Title VII claim must be determined based on 42 U.S.C. §  
7 2000e-5(f)(3), not 28 U.S.C. § 1391(e). This is because the  
8 general venue statute upon which Plaintiff relies is only operative  
9 "except as otherwise provided by law," and 42 U.S.C. § 2000e-  
10 5(f)(3) provides otherwise for Title VII claims. Accordingly, the  
11 United States' motion (doc. # 13), construed as a request for leave  
12 to file a sur-reply, shall be denied and dismissed as moot.

13 **b. Proper Venue for Plaintiff's Title VII Claim**

14 The fora available to Plaintiff for his Title VII claim must  
15 be determined in view of 42 U.S.C. § 2000e-5(f)(3) and its  
16 interpretive case law. Under 42 U.S.C. § 2000e-5(f)(3), a Title  
17 VII claim may be brought in any judicial district in a state "in  
18 which the unlawful employment practice is alleged to have been  
19 committed, . . . in which the employment records relevant to such  
20 practice are maintained and administered, or . . . in which the  
21 aggrieved person would have worked but for the alleged unlawful  
22 employment practice." 42 U.S.C. § 2000e-5(f)(3); Johnson v.  
23 Payless Drug Stores, N.W. Inc., 950 F.2d 586, 587 (9th Cir. 1991).  
24 Otherwise, the action may be brought in any judicial district where  
25 the defendant keeps its principal office. 42 U.S.C. § 2000e-  
26 5(f)(3). The Ninth Circuit has held that, in failure-to-promote  
27 cases under Title VII, "venue is proper in both the forum where the  
28 employment decision is made and the forum in which that decision is

1 implemented or its effects are felt [by the plaintiff]."

2 Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 506  
3 (9th Cir. 2000).

4 In Passantino, a plaintiff who worked in Tacoma, Washington  
5 alleged that she had been repeatedly passed over for several  
6 promotions because of her gender. Id. at 499-500. The defendant  
7 argued that New Jersey was the only permissible venue because that  
8 was where the promotional decision was actually made. Id. at 504.  
9 The Ninth Circuit observed that such a narrow reading of the venue  
10 rule would lead to the perverse result that, while other Title VII  
11 complainants could sue where they were employed, those complaining  
12 of a failure to promote would be required to litigate in far-away  
13 places any time an adverse promotional decision was made in a more  
14 distant office. See id. at 505. The court noted that the  
15 increased burden of litigating in a federal court on the other side  
16 of the country would be "inconsistent with the beneficent purposes  
17 of Title VII. Id. Because "[p]laintiffs unlawfully denied a  
18 promotion, like those discharged, feel the effects of their injury  
19 where they actually work," the court concluded that venue was  
20 proper in the Western District of Washington. Id.

21 In the instant case, the United States maintains that venue is  
22 not appropriate in this District primarily because (1) the alleged  
23 unlawful employment practice-- presumably the adverse promotional  
24 decision-- was committed by officials in Akron, and (2) Plaintiff  
25 would have worked in Akron but for the adverse promotional  
26 decision. See Mot. (doc. # 9) at 3. Both of these arguments fail.

27 It is clear from Passantino that the seat of power from which  
28 an employer makes its employment decisions is not dispositive on

1 the issue of venue in Title VII cases when the aggrieved employee  
2 works in a different state than the powers that control the  
3 employee's advancement. While an unlawful employment practice may  
4 literally occur at a decision making level in another office, it  
5 will also be deemed to occur for venue purposes where the plaintiff  
6 works and suffers injury. Therefore, even if the decision not to  
7 promote Plaintiff was made by officials in Akron, that only  
8 establishes the Northern District of Ohio as one possibility for  
9 venue. Another forum contemplated by Passantino is any judicial  
10 district in the state in which Plaintiff was working at the time  
11 the adverse promotional decision was made-- in this case, Arizona.

12 Plaintiff's response reflects that he was working in Glendale,  
13 Arizona at the time he was most likely passed over for promotion.  
14 Plaintiff maintains that he has been working as the Postal  
15 Service's Manager of Remote Encoding Operations in Glendale for the  
16 past ten years. See Resp. (doc. # 10) at 2-3. The United States  
17 does not refute Plaintiff's assertion that he has been working in  
18 Arizona for this period and, in fact, acknowledges his present  
19 employment there.<sup>2</sup> See id. at 3. Although the decision not to  
20 offer Plaintiff the promotion may have been made in Akron,  
21 Plaintiff would have felt the effect of his injury in Arizona where

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23 <sup>2</sup> The declaration attached to the United States' motion alludes  
24 to Plaintiff's past work in Cleveland, Ohio, but does not specify the  
25 time period of his tenure at that office. See Mot. (doc. # 9), Ex.  
26 A ("Breault Decl.") ¶ 5 (anticipated testimony of Michael B. Potts  
27 concerning Plaintiff's work at the Processing and Distribution Center  
28 in Cleveland, Ohio). Without a more specific reference to time, and  
in the absence of any challenge to Plaintiff's assertion that he has  
worked in Arizona for the past ten years, the Court must conclude  
that the United States concedes that Plaintiff was employed in  
Arizona during that time.

1 he was apparently working when the decision was made. Therefore,  
2 under Passantino, both the Northern District of Ohio and the  
3 District of Arizona are appropriate venues for the Title VII claim.

4 Because venue appears to be proper in this District based on  
5 the arguments raised, the United States' motion to transfer venue  
6 pursuant to 28 U.S.C. § 1406(a) must be denied at this time.  
7 However, because venue would also be appropriate in the Northern  
8 District of Ohio, the Court must consider whether transfer is  
9 appropriate under section 1404(a).

10 **2. Transfer Pursuant to 28 U.S.C. § 1404(a)**

11 Under section 1404(a), "a district court may transfer any  
12 civil action to any other district . . . where it might have been  
13 brought" when "the convenience of parties and witnesses" or "the  
14 interest of justice" so requires. 28 U.S.C. § 1404(a). The  
15 decision of whether to transfer a case is within the broad  
16 discretion of the district court. Jones v. GNC Franchising, Inc.,  
17 211 F.3d 495, 498 (9th Cir. 2000). Such decisions require  
18 "individualized, case-by-case consideration of convenience and  
19 fairness." Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29 (1988)  
20 (citation omitted). Based on the parties' arguments, the factors  
21 most relevant to the analysis of the present motion (doc. # 9)  
22 include (1) Plaintiff's choice of forum; (2) public interest in  
23 local adjudication of local controversies; (3) convenience of the  
24 parties and witnesses; (4) the availability of compulsory process  
25 to compel attendance of unwilling non-party witnesses; (5) the  
26 differences in the costs of litigation in the two forums; and (6)  
27 ease of access to sources of proof. See Jones 211 F.3d at 498.  
28 While these factors derive from the law of forum non conveniens,

1 section 1404(a) provides for greater flexibility and discretion.  
2 See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1982).

3 The moving party bears the burden of establishing that the  
4 balance of conveniences favors transfer. Commodity Futures Trading  
5 Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979). "The  
6 defendant must make a strong showing of inconvenience to warrant  
7 upsetting the plaintiff's choice of forum." Decker Coal Co. v.  
8 Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986).  
9 Moreover, transfer must alleviate rather than merely shift  
10 inconvenience to another party. Id.

#### 11 **1. Plaintiff's Choice of Forum**

12 Great weight is generally accorded a plaintiff's choice of  
13 forum. Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987) (citing  
14 Tex. E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.,  
15 579 F.2d 561, 567 (10th Cir. 1978)). This is particularly so in  
16 cases arising under Title VII, which is governed by a venue statute  
17 generally perceived as expanding the fora available to plaintiffs.  
18 Cf. Passantino, 212 F.3d at 504 (finding that Title VII's broad  
19 venue provision "was necessary to support the desire of Congress to  
20 afford citizens full and easy redress of civil rights grievances")  
21 (citation omitted). When a more permissive venue statute applies,  
22 the Ninth Circuit has held that the plaintiff's choice of forum is  
23 entitled to greater deference as a matter of law. See, e.g., Sec.  
24 Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985)  
25 (because the securities laws afford many options for venue,  
26 defendants would have to make a stronger showing in order to  
27 disturb the plaintiffs' choice of forum).

28 Although Plaintiff's choice of forum for his Title VII claim



1 may be similarly entitled to greater deference as a matter of law,  
2 this view must be tempered by the fact that Plaintiff's ADEA claim,  
3 which is governed only by the general venue statute, would not  
4 command the same level of deference. Nevertheless, for the reasons  
5 explained more fully below, the Court is satisfied that the United  
6 States has made a sufficiently strong showing that the conveniences  
7 warrant transfer, notwithstanding the greater level of deference  
8 contemplated by Passantino and Vigman.

## 9       **2. Public Interest in Adjudication of Local Controversies**

10       When an incident takes place within a judicial district,  
11 courts often find there is a public interest in hearing the case  
12 locally. Residents within the Northern District of Ohio would  
13 assuredly take a keen interest in staffing matters at the Postal  
14 Service's Processing and Distribution Center in Akron. However,  
15 the Court must also remain sensitive to the interest of Arizona in  
16 providing a forum for the protection of its residents including  
17 Plaintiff. Cf. Haisten v. Grass Valley Med. Reimbursement Fund,  
18 784 F.2d 1392, 1399 (9th Cir. 1986) (holding that jurisdiction was  
19 proper even though the defendant had absolutely no physical contact  
20 with the forum state, because the defendant's policies had effects  
21 in the state, and because the state had an interest in providing a  
22 forum for the protection of its residents).<sup>3</sup> Accordingly, the

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24       <sup>3</sup> The Court is aware that personal jurisdiction disputes and  
25 venue disputes often turn on different issues. However, where the  
26 public interest of a state has led courts to conclude that the  
27 exercise of personal jurisdiction over a nonresident defendant would  
28 comport with due process, this fact is illuminating as to the similar  
public interest considerations raised by section 1404(a). See  
Passantino, 212 F.3d at 505, n.8 ("Although we recognize that the  
issues involved in personal jurisdiction disputes are different from  
the issues involved in venue disputes, it is clear that if exercising

1 Court concludes that the local interest in hearing this case in the  
 2 Northern District of Ohio, on its own, is insufficient to supersede  
 3 both the countervailing public interest of Arizona and the great  
 4 deference accorded Plaintiff's choice of forum.

### 5 **3. Convenience of the Witnesses**

6 The majority of the Postal Service's anticipated fact  
 7 witnesses reside or work within or near the Northern District of  
 8 Ohio. Prospective witnesses with personal knowledge of the  
 9 circumstances surrounding the selection process for the Akron Plant  
 10 Manager position include the following Postal Service employees:

- 11 • Kenneth F. Winters Pittsburgh, Pennsylvania
- 12 • Susan L. Marsh Pittsburgh, Pennsylvania
- 13 • David M. Patterson Buffalo, New York
- 14 • Thomas F. Kelley Columbus, Ohio
- 15 • Phillip R. Sindelar, Jr. Painseville, Ohio
- 16 • Christopher H. Smith Warrendale, Pennsylvania

17 Breault Decl ¶ 5. However, as each remains in the Postal Service's  
 18 employ, their location does not mandate transfer. The Court  
 19 presumes the Postal Service can compel their attendance at trial in  
 20 Arizona. See STX, Inc. v. Trils Stik, Inc., 708 F. Supp. 1551,  
 21 1556 (N.D. Col. 1988) (citing Galonis v. Nat'l Broad. Co., 498 F.  
 22 Supp. 789, 793 (D. N.H. 1980)) (discounting inconvenience to  
 23 party's employee-witnesses who can be compelled to testify).

24 In addition, the United States anticipates calling the  
 25 following former Postal Service employees:

26 \_\_\_\_\_  
 27 personal jurisdiction over a particular defendant would comport with  
 28 due process, this fact provides support for reading an otherwise  
 ambiguous venue statute in harmony with the jurisdictional rule.").

- 1 • Norman M. Callhoun Indianapolis, Indiana
- 2 • Sernia P. Richardson Pittsburgh, Pennsylvania
- 3 • Gary McCurdy Cranberry Township, Pennsylvania
- 4 • Judson Zernechel Canton, Ohio
- 5 • Michael B. Potts Copely, Ohio

6 Id. Because these individuals are no longer employees of the  
7 Postal Service, they cannot be compelled to appear at trial. On  
8 the other hand, transfer would bring at least two of the  
9 prospective nonparty witnesses, Zernechel and Potts, within the  
10 subpoena power of the Northern District of Ohio. See Fed. R. Civ.  
11 P. 45(c)(3)(B)(iii).

12 Plaintiff in turn emphasizes four prospective witnesses whom  
13 he contends are important to his case-- an argument he raises for  
14 the first time in an unauthorized second response. See Second  
15 Resp. (doc. # 12) at 2. He fails, however, to indicate the names  
16 of any of his prospective witnesses, the basis of their knowledge,  
17 the anticipated subject matter of their testimony, or their  
18 affiliation, if any, with the Postal Service. See id. Even if the  
19 Court were to consider Plaintiff's untimely argument, the scant  
20 information he has provided tends more to support transfer than to  
21 demonstrate any significant value in retaining venue in this  
22 District. At least two of his prospective witnesses reside outside  
23 Arizona, see Second Resp. (doc. # 12) at 2, placing them beyond the  
24 reach of compulsory process in this Court if they were indeed  
25 nonparty witnesses, see Fed. R. Civ. P. 45(c)(3)(B)(iii).  
26 Moreover, transfer to the Northern District of Ohio would most  
27 likely alleviate any inconvenience for Plaintiff's prospective  
28 witness or witnesses located in Washington, D.C.

1 In short, Plaintiff belatedly suggests that the convenience of  
2 his prospective witnesses should discourage transfer, but provides  
3 no information about these individuals or their anticipated  
4 testimony. In contrast, the evidence before the Court demonstrates  
5 that the individuals identified by the United States can testify to  
6 the merits of Plaintiff's claims based on their personal knowledge  
7 of the selection process for the Plant Manager position in Akron.  
8 See Williams v. Bowman, 157 F. Supp. 2d 1103, (N.D. Cal. 2001)  
9 (similarly finding that although both parties identified witnesses  
10 in both districts, defendants identified individuals that would  
11 likely testify to the merits of the lawsuit, indicating this factor  
12 weighed in defendants' favor); see also Tel. Mgmt. Corp. v.  
13 Goodyear Tire & Rubber Co., 5 F. Supp. 2d 896, 898 (transferring  
14 venue in a contract case to the district where individuals who  
15 worked on the contract at issue were located, including retired  
16 individuals no longer subject to compulsory trial attendance).  
17 Furthermore, for all that appears, the transfer sought by the  
18 United States would most likely alleviate any inconvenience to  
19 Plaintiff's prospective witness or witnesses located in Washington,  
20 D.C. Finally, while only Kelley, Potts, Sindelar, and Zernechel  
21 reside in Ohio, the Court finds it would be more convenient for the  
22 other individuals to travel to Ohio in lieu of Arizona. See Int'l  
23 Comfort Prods. v. Hanover House Indus., Inc., 739 F. Supp. 503, 506  
24 (D. Ariz. 1989) (transferring suit to Pennsylvania where  
25 defendants' witnesses resided primarily there and in New York).

26 Accordingly, the Court concludes that the convenience of the  
27 witnesses weighs heavily in favor of the transfer sought by the  
28 United States. See id. at 507 ("The most critical factor to review

1 is the convenience of the witnesses.") (citing L.A. Mem'l Coliseum  
2 v. Nat'l Football League, 89 F.R.D. 497 (C.D. Cal. 1981)).

#### 3 **4. Availability of Compulsory Process**

4 Of the five prospective nonparty witnesses identified by the  
5 United States, none reside in Arizona. Breault Decl. ¶ 5. Because  
6 all of these individuals would fall outside the subpoena power of  
7 any court in this District, see Fed. R. Civ. P. 45(c)(3)(B)(iii),  
8 this factor offers no justification for this Court to retain venue.  
9 Although the United States acknowledges that three of its five  
10 prospective nonparty witnesses currently reside in Pennsylvania and  
11 Indiana, it is apparent that the remaining two individuals would at  
12 least be subject to compulsory process in the Northern District of  
13 Ohio. See Breault Decl. ¶ 5; Fed. R. Civ. P. 45(c)(3)(B)(iii).  
14 Finally, at least two of Plaintiff's prospective witnesses reside  
15 outside Arizona, see Second Resp. (doc. # 12) at 2, and would lie  
16 beyond the reach of compulsory process in this Court if they were  
17 nonparty witnesses, see Fed. R. Civ. P. 45(c)(3)(B)(iii).  
18 Therefore, on balance, this factor favors transfer.

#### 19 **5. Costs of Litigation**

20 The most significant witnesses-- those with personal knowledge  
21 of the selection process for the Akron Plant Manager position-- all  
22 reside in and around the Northern District of Ohio. See Breault  
23 Decl. ¶ 5. Although Defendant would have to spend more money to  
24 discover evidence and to secure the attendance of these witnesses  
25 were the case to be tried in this Court, so too may Plaintiff whose  
26 prospective witnesses reside not only in Arizona, but also in  
27 Colorado and Washington, D.C. See Second Resp. (doc. # 12) at 2.  
28 On the other hand, Plaintiff contends that he would deplete a

1 year's worth of annual leave, thus impairing his retirement plans,  
2 if he were to continue proceeding pro se after a transfer to the  
3 Northern District of Ohio. Resp. (doc. # 10) at 3. Because the  
4 transfer sought by the United States would merely shift rather than  
5 eliminate the inconvenience of litigation costs, this factor  
6 neither favors nor disfavors transfer. See Decker Coal Co., 805  
7 F.2d at 843.

#### 8 **6. Ease of Access to Sources of Proof**

9 In assessing the relative inconvenience to the parties in  
10 gaining access to relevant sources of proof, the Court recognizes  
11 that documentary evidence is substantially less costly to produce  
12 than witness testimony. In the present case, however, none of the  
13 documentary evidence referenced in the parties' briefs is located  
14 in this District. The books and records concerning the selection  
15 process for the Plant Manager position in Akron are maintained and  
16 administered in the Postal Service's Eastern Area offices in  
17 Pittsburgh. Breault Decl. ¶ 3. In addition, Plaintiff's  
18 employment files and the files related to his previous EEOC  
19 complaints are kept in Denver, Colorado and Ashburn, Virginia.<sup>4</sup>  
20 See Resp. (doc. # 10) at 2. Although the various records are all  
21 located outside the Northern District of Ohio, the Court finds that  
22 they would be more conveniently transported to that venue in lieu  
23

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24 <sup>4</sup> The United States correctly notes that the Title VII venue  
25 statute, 42 U.S.C. § 2000e-5(f)(3), is only concerned with those  
26 records relating to the alleged unlawful employment practice. See  
27 Reply (doc. # 11) at 3. However, under section 1404(a), the Court  
28 must consider the ease of access to all relevant sources of proof.  
In this instance, although Plaintiff's employment files and EEOC  
filings are incapable of establishing venue, they may nevertheless  
become relevant for other purposes at trial.

1 of Arizona. Moreover, in the case at hand, transfer would most  
2 likely improve rather than impede Plaintiff's access to the stated  
3 sources of proof. For example, should the EEOC filings become  
4 relevant to Plaintiff's Title VII claim of retaliation, transfer  
5 would actually alleviate any inconvenience to Plaintiff of locating  
6 and transporting the appropriate files from Virginia, which is much  
7 nearer to the Northern District of Ohio than to this District.  
8 Accordingly, the Court finds that this factor also favors transfer.

9 In sum, the Court begins from a position affording great  
10 deference to Plaintiff's choice of forum on account of the more  
11 permissive venue provisions of Title VII. However, this deference  
12 can be overcome by a particularly strong showing that the  
13 conveniences favor transfer, and the Court finds that the United  
14 States has met this heavy burden here. From the evidence  
15 presented, the Court concludes that the convenience of the  
16 witnesses, the availability of compulsory process, and the ease of  
17 access to sources of proof all point toward the Northern District  
18 of Ohio as the most appropriate venue for this case. Therefore,  
19 the United States' motion to transfer (doc. # 9) will be granted.

20 **B. Motion to Dismiss for Improper Venue**

21 Also before the Court is the United States' motion to dismiss  
22 (doc. # 9) pursuant to Rule 12(b)(3) of the Federal Rules of Civil  
23 Procedure, which allows a party to seek dismissal of a complaint if  
24 the action was initiated in an improper venue. Fed. R. Civ. P.  
25 12(b)(3). As discussed above at Part II.A.1.b, supra, the evidence  
26 before the Court shows that the District of Arizona is a proper  
27 venue for Plaintiff's Title VII claim, a fact which would support a  
28 denial of the Rule 12(b)(3) motion on its merits. In light of the

1 Court's order transferring this case to the Northern District of  
2 Ohio pursuant to 28 U.S.C. § 1404(a), however, the Rule 12(b)(3)  
3 motion must be denied as moot.

4 **III. CONCLUSION**

5 In light of the foregoing analysis, the Court finds that venue  
6 would be proper in the District of Arizona as well as the Northern  
7 District of Ohio for both the ADEA claim and the Title VII claim of  
8 Plaintiff's Complaint. However, the Court concludes that, pursuant  
9 to 28 U.S.C. § 1404(a), the case should be transferred to the  
10 Northern District of Ohio for, inter alia, the convenience of the  
11 witnesses. Therefore,

12 IT IS ORDERED that the United States' Motion to Dismiss for  
13 Improper Venue, or in the Alternative to Transfer Case (doc. # 9)  
14 is GRANTED in part and DENIED in part.

15 IT IS FURTHER ORDERED that the United States' motion to  
16 transfer venue pursuant to 28 U.S.C. § 1404(a) (doc. # 9) is  
17 GRANTED.

18 IT IS FURTHER ORDERED that the United States' motion to  
19 dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3) (doc.  
20 # 9) is DENIED as moot.

21 IT IS FURTHER ORDERED that the United States' Motion to  
22 Disregard Plaintiff's Additional Response to Defendant's Motion to  
23 Dismiss (doc. # 13) is construed as a request to file a sur-reply  
24 to Plaintiff's Response to Defendant's Second Motion to Dismiss or  
25 Transfer Case to Ohio (doc. # 12) and is DENIED as moot.

26 IT IS FINALLY ORDERED directing the Clerk of the Court to  
27 . . .  
28



1 transfer this action to the Northern District of Ohio.

2 DATED this 10<sup>th</sup> day of February, 2006.

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6 Robert C. Broomfield  
7 Senior United States District Judge

8 Copies to counsel of record and plaintiff pro se